Environmental Pillar
Working for a sustainable future

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By email: Aarhus compliance@unece.org , Fiona.Marshall@un.org

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations, Av. de la Paix 10
1211 Geneva 10
Switzerland

Re. Observation from the Irish Environmental Pillar on: ACCC/C/2016/141

Dear Members of the Compliance Committee for the Aarhus Convention,

The hearing on November 8th 2018 proposed for the Communication ACCC/C/2016/141[1] from Right To Know CLG, (R2K), in relation to Ireland, (the Party Concerned), has come to the attention of the Environmental Pillar. The Environmental Pillar is comprised of 30 national independent environmental non-governmental organisations (eNGOs), who work together to represent the views of the Irish environmental sector. We wish to make some brief observations highlighting our interest in, and support for this important communication. The communication raises concerns on matters which are fundamental to our ability to advocate effectively for the environment in accordance with rights we are afforded under the Convention. The work of our members covers a broad range of areas including habitat conservation, wildlife protection, environmental education, sustainability, waste and energy issues, climate change, environmental democracy, as well as environmental campaigning and lobbying.

We wish in our observation to present some overall contextual comment which we hope the committee will find useful in considering the matters raised in the

[1] https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2016141-ireland.html

communication, and the alleged non-compliances set out in Section V of the communication.

At the outset, we wish to make clear that we do not dispute that the party concerned has taken certain steps to implement, at least in part, certain of the obligations under the convention in respect of access to environmental information. Naturally we welcome the efforts of the party concerned in this regard. The party concerned has set these out in its response, at some considerable length. This is arguably and regrettably in our view, to the detriment of focusing on certain clear and obvious issues evident with the lack of effectiveness of Ireland's implementation, and the underlying reasons for them, which might then have been of use to the committee in assisting the party concerned move toward greater compliance.

While we do not wish to detract from certain selective positive implementation actions highlighted by Ireland, we also hope the committee will not be distracted by them away from the core issues raised in the communication. The communication is in the main concerned with certain very specific and significant issues with the review or Access to Justice Obligations and the consequential issues arising. These include: the delays in appeals and the practices employed in making appeal decisions which further contribute to delays; and the potential for these issues of delay and practice to be further exploited by Public Authorities in compromising access to information, given an absolute failure to mitigate effectively against such vulnerabilities (delays) in either practice or law.

In this regard, we wish to make absolutely clear that we consider that despite a number of positive steps taken to implement the Information Pillar of the Convention, the whole system of access, and the information pillar of the convention is significantly undermined by the delays and consequential inadequacies of the review, (appeal) procedure undertaken by the Office of the Commissioner for Environmental Information, (OCEI). This is not to take issue with the staff involved, but this is simply an issue with the practical reality of the solution implemented and permitted to continue by Ireland. **This issue with the delay is now to the point where our members find the access to information on the environment process to be largely non-credible. This is particularly so when requested information touches on contentious areas of public policy, decisions, acts or omissions, and where contentious refusals arise. Irrespective of whether such refusal may or may not be justified – the delay in securing a decision on appeal, and the further delays which then must be contemplated by a requestor in actually getting the information both serve to significantly erode the efficacy of Ireland's implementation of Article 9(1) and 9(4) of the Convention, and compromise the rights under the Convention and integration required under Article 3(1).**

The data provided by the communicant in respect of the delays encountered in reviews speaks for itself. In no rational view of the world can these timeframes be considered to be "expeditious" per Article 9(1), or "timely" per Article 9(4), particularly given the nature and intent of providing access to information and the requirement for access to justice in assuring that.

We have no doubt that the hearing will end up considering various technical details and arguments. However, we would most respectfully urge the Committee not to lose sight of the big picture as it were in considering **if** Ireland has **effectively** provided for access to justice despite the structures and regulations put in place. In particularly we would highlight **all of the characteristics** so wisely **specified in Article 9(4)** which are required to be provided **to all of the reviews** governed by Article 9(1) of the convention dealing with the various reviews required for requests for environmental information. Article 9(1) cannot be read in isolation of these as is clear from how Article 9(4) is phrased. These characteristics were specified so that a 'tick-box' approach to access to justice could not serve to satisfy the obligation intended by the convention, as the system for accessing justice has to be effective in the terms of the characteristics set out in Article 9(4). We consider each of these characteristics to be collectively required, and that they are also necessarily mutually supporting.

In summary we submit that a review cannot provide for "adequate and effective remedies" where it is not also "timely". Access to requested environmental information where it requires years to get can never be 'adequate' or 'effective' particularly for our purposes, or indeed most purposes. It is also clearly not "timely" in any meaningful sense of the word, **where timely connotes provision within an appropriate period of time**. This is particularly bearing in mind that access to information is often crucial to give real and meaningful effect to the other pillars of the Convention. This is of particular concern to us in being able to advocate and participate in an informed way in what are invariably time-limited participatory consultation processes. It is also particularly difficult for our members when trying to determine the need to challenge decisions/acts or omissions, and where full access to necessary information to facilitate an informed decision can't be secured within the very short timeframes allowed to seek Judicial Review in certain matters. For example our planning system only allows for 8 weeks following a decision to seek Judicial Review, and given the context that Judicial Review in Ireland is such an onerous undertaking, albeit necessary at times. There is therefore an inherent and self-evident incompatibility in the pillars here. We would be happy to clarify this further at the hearing as necessary and to provide numerous supporting examples, but do not wish to over-complicate this observation with these here.

Ireland has addressed parts of a possible solution for Article 9(1), this is not denied, but it has not implemented a system which accords with what is required and specified

through Article 9(1) to be implemented, namely to be expeditious. Nor has it delivered what is required when it is read, as it must be in conjunction with Article 9(4), which requires the reviews to be effective by: providing adequate, effective remedies and for them to be timely.

Access to information after such delays as highlighted in this communication cannot be considered to provide for an adequate remedy, nor a timely one. The system as implemented is simply not fit for purpose as currently operated and prescribed in law. We have a saying here in Ireland which we hope translates in a meaningful way: **"Justice delayed is justice denied"** . This is nowhere better evidenced than in the length of time taken to complete an OCEI appeal/review, and the time then to reach a final decision on a request which has been reviewed, with the iterations involved in the Irish practice. This is regrettably compounded by the narrow jurisdiction of the Irish courts which can't order the release of information. The most a requestor can hope for if they are successful, is for the matter to be remitted to the Commissioner or the Public Authority for further consideration, and any subsequent decision could entail further administrative and/or judicial appeals.

Turning more particularly to the issues alleged in respect of Article 4. The party concerned argues in places that the communicant has not evidenced and established systemic intentional abuse by public authorities in defending the allegation in respect of Article 4(2),(7). We submit it is nigh on impossible for the communicant to evidence this, and note that the party concerned has not established evidence to the contrary. Notwithstanding this comment, we submit the issue of substantiation is once again a distraction, and it may be helpful to take a step back. The real issue is that the system as implemented is vulnerable to the abuse identified by the communicant, and **the review process instead of preventing it – in fact facilitates it.** In short, all a public authority has to do is refuse an initial request, refuse again under the internal review procedure and the whole matter is "kicked to touch" to use football parlance to signify how the request is neutralised and put out of play as it were once it goes to appeal. This is because the appeal/review undertaken by the OCEI takes so long, and often is merely concerned with jurisdiction rather than whether information should be released. The delay makes the access request typically irrelevant and useless to you by the time you get a decision. That is quite apart from the further delays arising in actually getting the information following an appeal, as has been highlighted by the communicant. The delays fundamentally compromise the important integration across the three pillars envisaged at the heart of the convention, in Article 3(1). This is namely to allow the public and eNGOs protect their interest in a healthy environment, by enabling them to access environmental information; so they can participate in an informed way in environmental decision making; and where those rights are supposed to be upheld by effective access to justice. The system as configured allows for substantial delays prior

to determining threshold jurisdictional matters, such as: whether the information requested is environmental or not or the body is a public authority. There are clear and obvious ways how this might be overcome, and abuse prevented. But instead a lengthy process is allowed to persist, paralysing the request with slower than slow motion.

We fully accept that no system is perfect and that mistakes will be made, and there will always by paragons of virtue and unscrupulous actors in any process. However, that is exactly the purpose and intent behind the Access to Justice provisions, and why their effective implementation is so essential, and why the issues raised regarding their deficiency in this communication are thus so important and well founded.

It is notable in Ireland's response of 5th May 2017, that in section 2.12 Ireland quotes from the Committee's findings in ACCC/C/2007/21[2] (EC) to support Ireland's argument that in effect small failures in adequacy of implementation do not result in findings of non-compliance. We don't believe that is in dispute here. But what is instead at the heart of this communication from R2K is a fundamental flaw with the review procedures, and it is a fatal Achilles heel. In that regard, we wish to highlight an important element of the extract Ireland included from the decision ACCC/C/2007/21 in paragraph which regrettably wasn't focused on by Ireland. Careful consideration of the extract quoted infact highlights a critical distinguishing factor identified by the Committee, and it is the same one raised in the R2K communication, namely the critical contribution of the adequacy of the review procedures to compliance and effective implementation. In short it is particularly interesting to note in the extract from the Committee's findings in ACCC/C/2007/21 below the importance the committee has put on the review procedure in rectifying small errors and non-compliances as it were, seeing adequate and effective access to justice as a fundamental linchpin for effective implementation. (emphasis added)

> "33. The Committee considers it important to point out the aforementioned deficiencies in the handling of the information requests in order to clarify the obligations under the Convention with regard to environmental information and thereby contribute to better implementation of its provisions. However, it does not consider that in every instance where a public authority of a Party to the Convention makes an erroneous decision when implementing the requirements of article 4, this should lead the Committee to adopt a finding of non-compliance by the Party, **provided that there are adequate review procedures.** The review procedures that each Party is required to establish in accordance with article 9, paragraph 1, are intended to correct any such failures in the processing of information requests at the domestic level, and as a general rule, it is only

[2] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2007-21/Findings/ece_mp.pp_c.1_2009_2_add.1_eng.pdf

when the Party has failed to do so within a reasonable period of time that the Committee would consider reaching a finding of non-compliance in such a case."

The issue central to the R2K communication is of course that the review procedures are not adequate, and the rest flows from this.

It is important to note that the situation of these delays is a function of deliberate decisions, a number of which the committee may consider hard to substantiate, but the most notable and indisputable of which is a deliberate decision not to require the review of the OCEI to be undertaken within a prescribed period, or even "expeditiously" or in a "timely" manner, and to transpose this in law, and facilitate it in practice. These issues have been raised by us and colleagues on numerous occasions and most plainly in the context of a submission[3] the Environmental Pillar made to the public consultation on the implementation of Article 9 which followed on our representatives in the Environmental Law Implementation Group ,(ELIG), having highlighted numerous issues with Ireland's implementation of A2J. This is in stark contrast to the provisions in the Freedom of Information, (FOI) regime set out by the communicant. This is a matter which has been raised with the Irish Government and they have clearly decided not to transpose this. Moreover, the party concerned is defending the system as implemented and are defending the timeframes which we consider are unacceptable and non-compliant with any reasonable interpretation of the convention and implementing EU Directive.

The issue of resourcing for the OCEI raised, is not just one of staff but also extends to financial resources necessary to pursue litigation to defend OCEI decisions if challenged by Public Authorities, and also to pursue clarifications in the courts which might then serve to expedite deliberations on matters such as key definitions such as "environmental information". So this serves to compound matters. We can substantiate this as required.

In conclusion, we would like to thank the Committee for their deliberations, and the Secretariat for the efforts in assisting all those concerned with this communication. We would also like to take this opportunity to put on record our appreciation of the work of the communicant Right To Know in advancing access to environmental information. It does great public service in this regard, and its work is of particular value from the point of view of facilitating environmental advocacy, and environmental protection and thus supporting the fundamental objective of the convention in Article 1 and the integration envisaged in its three pillars in Article 3(1).

[3] http://environmentalpillar.ie/wp/wp-content/uploads/2015/07/Environmental-Pillar-Submission-Public-Consultation-Access-to-Justice-Implementation-of-Article-9-of-the-Aarhus-Convention.pdf

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Finally, we would ask that any clarifications sought in relation to this observation are directed to: Attracta@ien.ie, as the Facilitator of the Environmental Law Implementation Group,ELIG so that they can receive speedy and priority attention.

Yours sincerely

Michael Ewing, Coordinator of the Environmental Pillar.

The Environmental Pillar is an advocacy coalition of 30 national environmental NGOs in Ireland, and a national Social Partner.